

**STATE OF MICHIGAN
IN THE SUPREME COURT**
Appeal from the Michigan Court of Appeals
(Saad, P.J., and Sawyer and Hoekstra, JJ.)

JULIE A. PUCCI,

Plaintiff-Appellant,

v

CHIEF JUDGE MARK W. SOMERS, In his
individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee.

Supreme Court No.
Court of Appeals No. 325052
Wayne County Circuit Court
LC No. 13-014644-CZ

**PLAINTIFF-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF ORDER APPEALED FROM AND RELIEF REQUESTED

On March 17, 2016, the Michigan Court of Appeals issued its per curiam unpublished Opinion which reversed the trial court's grant of Plaintiff-Appellant's motion for summary disposition.

On May 2, 2016, the Michigan Court of Appeals denied Plaintiff-Appellant's timely motion for reconsideration.

Plaintiff-Appellant now seeks leave to appeal in this Court. She seeks an order which grants her Application and reverses the ruling of the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

- I. Did the Court of Appeals commit clear reversible error when it disregarded the plain language of MCL § 691.1408(1) and judicially insert words to invalidate indemnification for personal capacity judgments against governmental employees who cause injury in the course of their employment and within the scope of their authority?

Plaintiff-Appellant answers: Yes.

- II. Did the Court of Appeals commit clear reversible error when it failed to acknowledge the adjudicated fact that Somers acted in his official capacity when he terminated Pucci as Deputy Court Administrator and violated her constitutional rights?

Plaintiff-Appellant answers: Yes.

- III. Does the Court of Appeals ruling impermissibly restrict the powers and duties granted chief judges in MCR 8.110(C), conflict with binding Michigan Supreme Court precedent and the SCAO's position on indemnification policies for judges and judicial staff?

Plaintiff-Appellant answers: Yes.

- IV. Does the Court of Appeals Opinion conflict with an earlier Michigan court of appeals opinion?

Plaintiff-Appellant answers: Yes.

- V. Did the Court of Appeals' suggestion that a local funding unit may veto a court's decision to adopt an indemnification policy which assumes responsibility for a judgment related to administrative employment decisions violate the separation of powers doctrine?

Plaintiff-Appellant answers: Yes.

- VI. Did the Court of Appeals misread *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998) to invalidate the 19th District Court’s indemnification policy for the Pucci judgment?

Plaintiff-Appellant answers: Yes.

- VII. Did the Court of Appeals commit reversible error when it failed to consider or address whether Pucci may enforce the indemnification policy for the judgment as a third party beneficiary?

Plaintiff-Appellant answers: Yes.

- VIII. Is the Court of Appeals ruling prohibiting governmental agencies from indemnifying governmental employees for personal capacity judgments for work related claims against public policy because it will chill decision making for fear of personal liability?

Plaintiff-Appellant answers: Yes.

- IX. Does the Court of Appeals Opinion diminish public confidence in the judiciary because the decision was animated by subjective “belief” and not the law?

Plaintiff-Appellant answers: Yes.

INTRODUCTION AND GROUNDS FOR APPLICATION

Julie Pucci sued Mark Somers, a judge, when he improperly used his authority as 19th District Court Chief Judge to fire her as Deputy Court Administrator. (Appx. p. 114a, Exhibit N, Third Amended Complaint.) Following a jury trial, a federal judgment was entered against Somers pursuant to 42 USC §1983 for his violation of Pucci's constitutional rights. *Pucci v 19th Dist Court* at 596 Fed Appx 460, 462 (2015); (Appx., p. 22a, Exhibit C, Amended Judgment.) Pucci domesticated the judgment in Wayne County Circuit Court which issued a non-periodic writ of garnishment to collect the 19th District Court's obligation to Judge Somers for payment of the judgment pursuant to the court's indemnification policy. (Appx. p. 31a, Exhibit F, Domesticated Judgment; Appx. p. 35a, Exhibit G, Writ of Garnishment (Non-Periodic).)

The 19th District Court reversed its previous position that the indemnification policy was valid and enforceable and objected to the *Writ*. (Appx. p. 137a, Exhibit O, *Amicus Brief*; Appx. p. 189a, Exhibit P, Garnishee Disclosure.) The parties submitted cross-motions for summary disposition under MCR 2.116(C) (10). (Appx. p. 191a, Exhibit Q, Plaintiff's MSD; Appx. p. 267a, Exhibit R, Garnishee-Def MSD.) The Wayne County Circuit Court held the indemnification policy enforceable and entered judgment against the 19th District Court for \$1,183,390.96. (Appx. p. 56a, Exhibit I, Order Granting Plaintiff's Motion for Summary Disposition.) The 19th District Court appealed to the Michigan Court of Appeals. (Appx. p. 59a, Exhibit J, Claim of Appeal.)

On March 17, 2016, in an unpublished *per curiam* opinion, the Court of Appeals reversed. *Pucci v 19th Dist Court*, 2016 Mich App LEXIS 560 (March 17, 2016) (Docket No. 325052). (Appx. p. 1a, Exhibit A.) The Court of Appeals ruled that "While we agree that a Chief Judge can adopt an indemnification policy that covers the court's employees and judges while acting in their official capacity, we do not believe that this power extends to indemnifying judges

for liability incurred in their personal capacity.” *Id.* at *18. On May 2, 2016, the Court of Appeals denied Pucci’s motion for reconsideration. (Appx. p. 106a, Exhibit L, Order Denying Plaintiff’s Motion for Reconsideration.)

Now, Pucci files this Application for Leave to Appeal the Court of Appeals ruling and identifies nine reasons as the grounds for this Application:

- (1) The Court engaged in impermissible judicial legislation when it disregarded the express language of MCL 691.1408(1) and inserted words that invalidated a governmental agency’s indemnification for so-called “personal capacity” judgments against governmental employees related to the discharge of their authorized official duties. MCR 7.305(B)(1), (2), (5).
- (2) The Court’s ruling that Somers was not covered by the indemnification policy was clearly erroneous because the U.S. Sixth Circuit Court of Appeals previously affirmed that Somers was acting in his official capacity as 19th District Court Chief Judge when he terminated Pucci as Deputy Court Administrator and violated her constitutional rights. *Pucci v 19th Dist Court* at 596 Fed Appx 460, 462 (2015). MCR 7.305(B)(5).
- (3) The Court’s decision conflicts with MCR 8.110(C), binding Supreme Court Authority and the State Court Administrative Office (SCAO) which authorized courts to adopt indemnification policies for personal capacity judgments related to administrative employment claims. MCR 7.305(B)(2), (3), (5)(b).
- (4) The Court’s ruling is incompatible with *O’Neill v 19th District Court*, (COA No. 223700, Unpublished, January 25, 2002) (Appx. p. 108a, Exhibit M) which held that a district court had authority to indemnify a judge for legal fees personally incurred for alleged misconduct when he was in private practice. MCR 7.305(B)(5)(b).
- (5) The Court’s suggestion that local funding units may interfere with a court’s decision to adopt an indemnification policy for judges and court employees violates the separation of powers doctrine. MCR 7.305(B)(3).
- (6) The Court misread *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998), to invalidate the 19th District Court’s indemnification policy for the *Pucci* judgment.
- (7) The Court failed to address whether Pucci, as a third-party beneficiary, could enforce the 19th District Court’s express promise that it would pay the *Pucci* judgment on Somers’s behalf. MCR 7.305(B)(2), (5)(a).

- (8) The Court's ruling is against public policy because without indemnification policies for personal liability qualified candidates will refuse appointment to administrative positions and/or not make difficult employment decisions they deem necessary for the efficient operation of their respective courts. MCR 7.305(B)(2), (3).
- (9) Allowing the Court's decision to stand will diminish public confidence in the judiciary because the ruling was admittedly based on personal "belief" and not the law. Applying the law of Michigan instead of the Court's personal belief requires a different result. MCR 7.305(2), (5)(a).

STATEMENT OF FACTS

A. The Underlying Federal Civil Rights Case:

Plaintiff-Appellant Julie Pucci, was terminated as Deputy Court Administrator of Garnishee Defendant-Appellee 19th District Court by then Chief Judge Defendant Mark Somers. Pucci sued Somers, the 19th District Court and the City of Dearborn (the court's local funding unit) in the United States District Court for the Eastern District of Michigan pursuant to 42 USC § 1983. Among other things, Pucci claimed that Defendants violated her *First Amendment* free speech rights and *Fourteenth Amendment* due process rights. Defendant Somers was sued in both his "individual" and "official" capacities. (Appx. p. 114a, Exhibit N, Third Amended Complaint.)

Shortly after filing, Pucci voluntarily dismissed the City of Dearborn because it had no say in the management of district court personnel. *Judicial Attorney's Association v State of Michigan*, 459 Mich 291 (1998). Responsibility for management and administration of local court personnel rested exclusively with Chief Judge Somers. *Id.* at 297-298; MCR 8.110(C)(3)(d).

Before trial, the United States Court of Appeals for the Sixth Circuit dismissed the 19th District Court under *Eleventh Amendment* sovereign immunity. *Pucci v 19th Dist Court*, 628 F3d 752 (6th Cir 2010). The Sixth Circuit rejected Somers's claim of qualified immunity in his

“individual capacity” and allowed Pucci to proceed against Somers in his “official capacity” for prospective injunctive relief. *Id.* at 765.

The case proceeded to trial.

On June 30, 2011, a federal jury found that Somers violated Pucci’s *First* and *Fourteenth Amendment* constitutional rights when he used his state-conferred administrative authority to terminate Pucci’s employment as Deputy Court Administrator. (Appx. p. 229a, Exhibit Q, Plaintiffs MSD Exhibit B, Jury Verdict Form.) After post-verdict motions, the District Court awarded judgment against Somers in his “individual capacity” in the amount of \$1,173,125.30. (Appx. p. 22a, Exhibit C, Amended Judgment.) *Pucci v Somers*, 834 F Supp 2d 690 (ED Mich, 2011). Somers appealed and the Sixth Circuit unanimously affirmed. *Pucci v 19th Dist. Court* at 596 Fed. Appx. 460, 462 (2015). (Appx. p. 10a, Exhibit B.)

B. The 19th District Court’s Indemnification Policy For The *Pucci* Judgment:

On June 13, 2011, prior to trial, the 19th District Court issued a written indemnification policy for payment of any claim or judgment entered against 19th District Court judges and supervisory personnel for administrative employment decisions. (Appx. p. 25a, Exhibit D, Indemnification Policy.) The indemnification policy provided, in pertinent part:

It is the official policy of the 19th District Court that the supervisory personnel identified herein shall be indemnified and held harmless for the costs of defending and for any judgment entered against them resulting from any civil action for discretionary administrative decisions made within the scope of his or her authority including decisions regarding the hiring, firing and/or discipline of its employees and the creation, reorganization and/or elimination of personnel positions as they deem appropriate to the efficient, economical and necessary functioning of the court.

Id. Chief Judge Somers adopted the indemnification policy pursuant to MCL 691.1408(1), MCR 8.110(C) and MCL 600.8221. *Id.*

On January 1, 2012 the Hon. Richard Wygonik was appointed by the Michigan Supreme

Court as 19th District Court Chief Judge. (Appx. p. 28a, Exhibit E, Wygonik Affidavit, ¶ 1.) Chief Judge Wygonik reaffirmed the indemnification policy and stated that the 19th District Court would indemnify Somers for the *Pucci* judgment. In an Affidavit filed in the federal collection proceedings, Chief Judge Wygonik attested:

1. Effective January 1, 2012, the Michigan Supreme Court appointed me Chief Judge of the 19th District Court Dearborn, Michigan.
2. On June 9, 2011, the then-Chief Judge of the 19th District Court, Mark Somers, drafted and adopted an indemnity policy. (Attachment 1).
3. **Under that policy, the 19th District Court will indemnify any of its judges for settlements, judgments or mediation amounts that plaintiffs receive against a judge of the 19th District Court while the judge was executing the duties of his or her office whether judicial or administrative in nature.**
4. **As the Chief Judge of the 19th District Court, I have adopted the earlier indemnity policy and decided that the 19th District Court will indemnify Judge Mark Somers for the judgment or any settlement in the above captioned case, *Pucci v. Somers*.**

Further, deponent sayeth not.

(Bold added). (*Id.*)

C. The Federal Collection Proceedings:

On May 12, 2012, at Pucci's request, the United States District Court issued a *Writ of Garnishment (Non-Periodic)* against the City of Dearborn, as the local funding unit, to satisfy the judgment and/or to fund the indemnification policy adopted by the 19th District Court. The City of Dearborn filed a *Motion to Quash* for lack of subject matter jurisdiction¹. (Appx. 339a,

¹ The City of Dearborn was represented by The Miller Canfield Law Firm in federal collection proceedings where they opposed the 19th District Court's position. (Appx. p. 442a, Exhibit X, Motion for Disqualification (exhibits omitted.) The same law firm has represented the 19th

Exhibit U, Motion to Quash.) Dearborn and Pucci filed cross-motions for summary judgment. (Appx. p. 357a, Exhibit V, Plaintiff's Motion for Summary Judgment and Brief in Support; Appx. p. 339a, Exhibit W, City of Dearborn Motion for Summary Judgment and Brief in Support.) The 19th District Court filed an *Amicus Brief* which admitted and acknowledged its obligation under the indemnification policy, sought its enforcement and funding from the City of Dearborn to pay the judgment. (Appx. p. 137a, Exhibit O, 19th District Court *Amicus Brief*.)

The U.S. District Court granted Dearborn's motion for lack of subject matter jurisdiction, without prejudice. *Pucci v Somers*, 962 F Supp 2d 931 (ED Mich, 2013). The U.S. District Court noted that all parties agreed that the indemnification policy covered the judgment. *Id.* at 937. The U.S. District Court, however, declined ancillary jurisdiction because "[T]he indemnification theory is a new theory that was not part of the previous proceedings in this case." *Ibid.* The U.S. District Court ruled that "[Pucci] must seek her remedies against the state district court and the City of Dearborn under the federal judgment in state court." *Id.* at 933. This is the exact course Pucci followed.

D. The State Court Garnishment Proceedings:

On November 11, 2013, Plaintiff domesticated the federal judgment in Wayne County Circuit Court. (Appx. p. 31a, Exhibit F, Domesticated Judgment.) On December 4, 2013, the trial court issued the subject *Writ* to the 19th District Court to enforce the 19th District Court's indemnification policy for the *Pucci* judgment.² (Appx. p. 35a, Exhibit G, *Writ of Garnishment (Non-Periodic)*.) The 19th District Court reversed the position it advanced in its U.S. District Court *Amicus Brief* and objected to the *Writ*. (Appx. p. 137a, Exhibit O, *Amicus Brief*; Appx. p.

District Court in these state court proceedings and asserts arguments identical to those advanced by the funding unit below. (*Id.*)

² Pucci, as Somers's judgment creditor, may enforce this obligation. MCL 600.4011(1)(b); MCR 3.101(B)(2); MCR 3.101(G).

189a, Exhibit P, Garnishee Disclosure.)

After discovery, Pucci and the 19th District Court filed cross motions for summary disposition. (Appx. p. 191a, Exhibit Q, Pucci's MSD and Brief in Support; Appx. p. 267a, Exhibit R, 19th District Court MSD and Brief in Support; Appx. p. 316a, Exhibit S, Pucci Reply Brief; Appx. p. 329a, Exhibit T, 19th DC Reply Brief.) The Circuit Court found that Somers acted in the course of his employment and within the scope of his authority as Chief Judge when he terminated Pucci and violated her *First* and *Fourteenth Amendment* rights. (Appx. p. 38a, Exhibit H, Hearing Transcript of 11/26/2014, pp. 10-15). Accordingly, the Circuit Court enforced the indemnification policy and entered judgment against the 19th District Court for \$1,183,330.96. (Appx. p. 56a, Exhibit I, Order of 12/11/2014 Granting Plaintiff's MSD.)

E. The Court of Appeals Reverses:

The 19th District Court appealed the Circuit Court's ruling and the Court of Appeals reversed. *Pucci v 19th Judicial Dist Court*, 2016 Mich App LEXIS 560 (March 17, 2016) (Docket No. 325052). (Appx. p. 1a, Exhibit A.) On March 17, 2016, in an unpublished *per curiam* opinion, the Court of Appeals reversed because the judgment awarded Pucci was in Somers "personal capacity" and not his "official capacity." The Court stated:

It is noteworthy that the judgment in *Cameron* was entered against the court, id. at 472-428. It is upon this distinction that we believe that this case ultimately turns. While we agree that a Chief Judge can adopt an indemnification policy that covers the court's employees and judges while acting in their official capacity, we do not believe that this power extends to indemnifying judges for liability incurred in their personal capacity. Therefore, because the judgment in this case is against the judge in his personal capacity, the indemnification policy does not apply and defendant Court is not liable.

Id. at *18.

On April 5, 2016, Pucci filed a timely motion for reconsideration. (Appx. p. 75a, Exhibit K, Motion for Reconsideration.). On May 2, 2016 the Court of Appeals denied Plaintiff's

motion. (Appx. p. 106a, Exhibit L, Order Denying Motion for Reconsideration.)

Now, Pucci seeks this Court's leave to appeal the Court of Appeals' clearly erroneous ruling.

STANDARD OF REVIEW

The interpretation and application of a statute presents a question of law that the appellate court reviews *de novo*. *Tomecek v Bavas*, 482 Mich 484, 490 (2008).

This Court reviews *de novo* a trial court's decision on a motion for summary disposition under MCR 2.116(C) (10). *West v Gen Motors Corp*, 469 Mich 177, 182-183 (2003).

ARGUMENT

A. THE COURT OF APPEALS COMMITTED CLEAR REVERSIBLE ERROR WHEN IT DISREGARDED THE PLAIN LANGUAGE OF MCL § 691.1408(1) AND JUDICIALLY INSERTED WORDS TO INVALIDATE INDEMNIFICATION FOR PERSONAL CAPACITY JUDGMENTS AGAINST GOVERNMENTAL EMPLOYEES WHO CAUSE INJURY IN THE COURSE OF THEIR EMPLOYMENT AND WITHIN THE SCOPE OF THEIR AUTHORITY.

1. The Unambiguous Text of MCL 691.1408(1) Makes No Reference to “Individual Capacity,” “Personal Capacity,” “Official Capacity” Or the Form of the Judgment Indemnified.

Where the language of the statute is clear and unambiguous, courts must follow it. *Pohutsky v City of Allen Park*, 465 Mich 675, 683-684 (2002) citing *Robinson v City of Detroit*, 462 Mich 439, 459-460 (2000). A court may not assume that the Legislature inadvertently made use of one word or phrase instead of another and should take care to avoid a construction that renders any part of the statute surplusage or nugatory. *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 414 (1999). “Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.” *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218 (2011) (quotation omitted). The wisdom of a statute is for

the determination of the legislature and the law must be enforced as written.³ *Petipren v Jaskowski*, 494 Mich 190, 211 (2013); *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422 (2005). This rule is especially germane because Michigan strictly construes the provisions of the GTLA. *Fairley v Dept of Corr*, 497 Mich 290, 297-298 (2015).

The purpose of the GTLA is to immunize certain government agents and employees from tort liability. *Odom v Wayne County*, 482 Mich 459, 461, 468 (2008). The GTLA contemplates that, in some circumstances, government employees may be held personally liable for damages in the performance of their jobs. MCL 691.1407(2)(c). As noted in *Beaudrie v Henderson*, 465 Mich 124, 140 (2001):

Indeed, the Legislature has expressly authorized government agencies to defend and indemnify employees facing potential tort liability for injuries caused by the employee “while in the course of employment and while acting within the scope of his or her authority” MCL 691.1408(1).

The power of governmental employees to indemnify employees for work related tortious conduct is fundamental to the GTLA statutory scheme. *Id.*

Specifically, MCL 691.1408 reads:

(1) Whenever a claim is made or a civil action is commenced against an officer, employee, or volunteer of a governmental agency for injuries to persons or property caused by negligence of the officer, employee, or volunteer while in the course of employment with or actions on behalf of the governmental agency and while acting within the scope of his or her authority, the governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer, employee, or volunteer as to the claim and to appear for and represent the officer, employee, or volunteer in the action. The governmental agency may compromise, settle, and pay the claim before or after the commencement of a civil action. *Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal*

³The doctrine of expression *unis est exclusion alterius*, or inclusion by specific mention excludes what is not mentioned is also a rule of statutory construction. *Hackel v Macomb County Comm’n*, 298 Mich App 311, 324 (2012) citing *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 452 (2009). The doctrine is “a rule of construction that is a product of logic and common sense. The doctrine characterizes the general practice that when people say one thing they do not mean something else.” *Id.*

injuries or property damage caused by the officer, employee, or volunteer while in the course of employment and while acting within the scope of his or her authority,⁴ the governmental agency may indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment.” (Emphasis added.)

In *Wilson v Beebe*, 770 F2d 578, 588 (6th Cir 1985), the State of Michigan lawfully exercised its option under MCL 691.1408(1) and elected to indemnify a State Trooper for a personal capacity judgment which resulted from his violation of a citizen’s constitutional rights pursuant to §1983.⁵

The 19th District Court is one of ninety-eight district courts in the state. MCL §§600.8111 to 600.8163. The 19th District Court is its own administrative unit under the superintending control of this Court which appoints the chief judge to a two-year term. *Id.* at

⁴ Under the GTLA, “authority” is defined as “a power or right delegated or given, and “scope” is defined as the “extent or range of view, application, operation, effectiveness...” MCL 691.1407(5); *Petipren*, 494 Mich at 207. By court rule, statute and case law, a chief judge has authority over all personnel matters concerning court employees, including the decision to terminate. MCR 8.110(C)(3)(d); MCL 600.8221; *Judicial Attorney’s Association*, 459 Mich at 302-303. Under the GTLA, “authority” is defined as “a power or right delegated or given, and “scope” is defined as the “extent or range of view, application, operation, effectiveness...” MCL 691.1407(5); *Petipren*, 494 Mich at 207. An actor’s intent or motivation have no bearing on the scope of his or her authority. 494 Mich at 216.

⁵ The Sixth Circuit, 77 F2d at 588, explained:

A claim for damages against individual defendants seeking to impose individual liability for action taken under color of state law is not prohibited. Only if the purpose of the lawsuit is to coerce state action by the official sued and to impose a liability which “*must* be paid from public funds” does the *Eleventh Amendment* apply. *Edelman v. Jordan*, 415 U.S. at 663 (emphasis added). Here, unlike the defendant in *Edelman v. Jordan* and *Quern v. Jordan*, 440 U.S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979), Beebe held no state office which gave him control over state funds. Thus, a suit against him would not have the effect of forcing the State to expend public funds. Also, the liability which Wilson sought to impose was not one which *must* be paid from the State treasury. It will be paid by the State because the State has exercised its option under MCLA § 691.1408(1) and elected to indemnify Beebe. This obligation is not imposed on the State; it is an obligation voluntarily imposed. There would be no question of who would be liable for a judgment in this case except for the State’s voluntary decision to indemnify Beebe; only Beebe would be liable.

§§600.8101(1), 600.8103(3), MCR 8.110(B). The chief judge is responsible for hiring and firing court employees, as well as other administrative matters. MCR 8.110(C); *Judicial Attorney's Association v State of Michigan*, 459 Mich. 291, 302-303 (1998). Accordingly, the 19th District Court is a “governmental agency” as defined in MCL 691.1401(a) and Somers was, indisputably, discharging his governmental functions in his official capacity as Chief Judge when he terminated Pucci.

Under the statute, the triggering event for a governmental agency’s lawful adoption of an indemnification policy is “Whenever a judgment for damages is awarded” against a governmental agent or employee. *Id. Before and after judgment was fixed*, the 19th District Court, first through Somers and then Chief Judge Wygonik, agreed to indemnify Somers explicitly for the *Pucci* judgment. (Appx. p. 25a, Exhibit D, 19th DC Indemnification Policy; Appx. p. 28a, Exhibit E, Wygonik Affidavit, ¶¶3-4.) The Sixth Circuit found that Somers used his governmental position as 19th District Court Chief Judge to terminate Pucci as Deputy Court Administrator and violate her federal rights. *Pucci v 19th Dist Court* at 596 Fed Appx 460, 462 (2015);⁶ (Appx. p. 22a, Exhibit C, Amended Judgment.) This is the law of the case. *Ashker v Ford Motor Co*, 245 Mich App 9, 13 (2001) (the law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue.)

The clear text of MCL 691.1408(1) authorized the 19th District Court to adopt an indemnification policy for the *Pucci* judgment against Somers in his personal capacity because her injury resulted directly from Somers’s official acts as the court’s chief judge. *Id.* MCL 691.1408(1) does not contain the words “individual capacity,” “personal capacity,” or “official

⁶ This finding is also final and binding under the doctrines of *res judicata* and collateral estoppel. *Adair v State*, 470 Mich 105, 121 (2004); *Stoudemire v Stoudemire*, 248 Mich App 323, 334 (2001); *Eaton Co Rd Commr v Schultz*, Mich App 371, 377 (1994)

capacity.” The statute’s use of the term “judgment” is inclusive, without regard to form. The statute’s plain, ordinary language evinces the Legislature’s intent to authorize governmental agencies, like the 19th District Court, to indemnify public agents and employees for judgments against them especially where they incur personal liability in the discharge of their official functions. *Beaudrie*, 465 Mich at 140; *Wilson*, 770 F2d at 588.

The Court of Appeals defied every maxim of statutory construction and engaged in judicial activism when it relied solely on its “personal belief” to insert qualifying language into the statute to invalidate the indemnification policy for the personal capacity judgment. Like in *Wilson*, *supra* at 588, the 19th District Court lawfully exercised its option under MCL 691.1408(1) to indemnify Somers and assume responsibility for the judgment awarded Pucci for the violation of her constitutional rights. Pursuant to MCR 7.305(B)(1), (2), (5)(a), this Court should grant Pucci’s Application for Leave to Appeal.

2. The Court of Appeals Ruling Nullifies the Statutory Power of Governmental Agencies to Indemnify Public Employees Sued in Their Personal Capacity and Renders Nugatory Statutory Indemnification.

When interpreting a statute, “every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another.” *Lapeer County Clerk v Lapeer Circuit Court (In re Lapeer County Clerk)*, 469 Mich 146, 156 (2003) (internal citation omitted). Courts interpreting a statute must “avoid a construction that would render any part of the statute surplusage or nugatory.” *Tryc v Michigan Veterans’ Facility*, 451 Mich 129, 136 (1996).

The Court of Appeals ruling invalidated statutory indemnification under the GTLA for governmental employees who incur personal liability in the discharge of their governmental functions. This means that governmental agencies may no longer indemnify police officers, firefighters, teachers, judges, judicial staff and other public employees personally liable for gross

negligence, employment discrimination, violation of a citizen's constitutional rights or any other work related tort. MCL 691.1407(2)(c); MCL 37.2101, *et seq.*, MCL 15.361 *et seq.* The Court of Appeals, therefore, nullified the GTLA's statutory indemnification provision and disrupted the governmental immunity statutory scheme. *Beaudrie*, 465 Mich at 140; *Wilson*, 770 F3d at 588.

In addition, the *raison d'être* for statutory indemnification is to protect a governmental tortfeasor's personal assets from execution by a judgment creditor. *Id.*; *In Re Amfesco Industries*, 81 BR 777, 785-786 (ED NY, 1988). Statutory indemnification for a governmental employee is meaningless in the absence of personal liability for the work related tort. The Court of Appeals ruling negates that portion of MCL 691.1408(1) which authorizes governmental agencies to indemnify public workers who incur personal liability in the discharge of their governmental duties. Pursuant to MCR 7.305(B)(1), (2), (5)(a), this Court should grant Pucci's Application for Leave to Appeal.

B. THE COURT OF APPEALS COMMITTED CLEAR REVERSIBLE ERROR BECAUSE THE U.S. SIXTH CIRCUIT COURT OF APPEALS PREVIOUSLY AFFIRMED THAT SOMERS ACTED IN HIS OFFICIAL CAPACITY WHEN HE TERMINATED PUCCI AS DEPUTY COURT ADMINISTRATOR AND VIOLATED HER CONSTITUTIONAL RIGHTS.

The Court authorized an indemnification policy for a judge's "official acts" but not the one adopted by the 19th District Court for the *Pucci* judgment because it was against Somers in his "personal capacity." This is a non sequitur.

The Court wrongly equated personal liability in a § 1983 suit with a private, non-governmental act. This is clear error.

§ 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

A state actor who violates a citizen's constitutional rights is subject to a § 1983 suit in their "individual capacity" and/or their "official capacity." Individual capacity suits impose personal liability upon a government officer *because* of his official acts. *Hafer v. Melo*, 502 US 21, 26 (1991); *Kentucky v Graham*, 473 US 159, 165-166 (1985). If a state actor does not use his state-conferred office to violate a citizen's constitutional rights, no potential § 1983 liability exists in any capacity whatsoever. *Id.*

Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent" and not the named officer. *Id.* at 165-166 (quoting *Monell v New York City Dept of Social Services*, 436 US 658, 690, n. 55.) Relief in 'official capacity' suits, when granted, affects the defendant's office or position rather than his personal assets." *Perez Olivo v Gonzalez*, 384 F Supp 2d 536, 543 (DPR 2005). Indemnification for the individual officer, therefore, is unnecessary because only the governmental agency is liable for an "official capacity" judgment. *Id.*; *Will v Mich Dep't of State Police*, 491 US 58, 78 (1988)⁷.

For purposes of a §1983 suit, "The phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in

⁷ The *Will* Court explained:

Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v Holt*, 469 US 464, 471 (1985). As such, it is no different from a suit against the State itself, See e.g., *Kentucky v Graham*, 473 US 159, 1650166 (1985); *Monell, supra*, at 690, n. 55.

which the state officer inflicts the alleged injury.” *Hafer v Melo*, 520 US at 26. While the Court agreed that a court could indemnify judges and court employees for their “official acts” it did “not believe that this power extends to indemnifying judges for liability incurred in their personal capacity.” *Pucci, supra* at *18. This was clearly erroneous and resulted in material injustice.

The Sixth Circuit affirmed the fact that Somers incurred liability in his personal capacity under §1983 precisely because of his official acts as 19th District Court Chief Judge. *Id.*; *Pucci v. 19th District Court*, 596 Fed. Appx. 460 (2015). The Michigan Court Rules, Michigan statutes and binding Supreme Court authority expressly designate chief judges as the administrator of the court with power to discharge court employees. MCR 8.110(B), (C)(3), MCL 600.8221, *Judicial Attorney’s Association*, 459 Mich at 302-303 (1998). As a matter of undisputed fact and law, Somers’ official acts violated Pucci’s constitutional rights. *Ibid.* Pursuant to MCR 7.305(B)(5)(a), this Court should grant Pucci’s Application for Leave to Appeal.

C. THE COURT OF APPEALS RULING IMPERMISSIBLY RESTRICTS THE POWERS AND DUTIES GRANTED CHIEF JUDGES IN MCR 8.110(C), CONFLICTS WITH BINDING MICHIGAN SUPREME COURT PRECEDENT AND THE SCAO’S POSITION ON INDEMNIFICATION POLICIES TO PROTECT JUDGES AND JUDICIAL STAFF FROM PERSONAL LIABILITY FOR ADMINISTRATIVE EMPLOYMENT DECISIONS.

MCR 8.110(C) identifies the powers and duties of a trial court’s chief judge. In part, MCR 8.110(C) provides:

(2) As the presiding officer of the court, a chief judge shall:

(c) initiate policies concerning the court’s internal operations and its position on external matters facing the court;

(3) As the director of the administration of the court, a chief judge shall have administrative superintending power and control over judges of the court and all court personnel with the authority and responsibility to:

(d) supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel, with the exception of a judge's secretary and law clerk, if any;

(f) supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting;

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule.

In *Judicial Attorney's Association v State of Michigan*, 459 Mich. 291, 298-299 (1998), the Michigan Supreme Court explained the administrative powers of chief judges and the importance of the judiciary's autonomy:

There is no public environment in the state of Michigan more complex than the trial court component of the state's "one court of justice." *Under art 6, § 4 of the state constitution, the Michigan Supreme Court has general supervisory control of the courts and is constitutionally responsible for the efficient and effective operation of all courts within the state court system, but the day-to-day operation of the state's trial courts is in the hands of the chief judges of each court. The chief judges in turn are accountable to the Supreme Court and to the public for the operation of their courts, and are dependent on over 150 separate local governmental units for the bulk of the operational funding for their courts.* Const 1963, art 6, §§ 1, 4. MCR 8.110. *Grand Traverse Co v. Michigan*, 450 Mich. 457, 475; 538 N.W.2d 1 (1995). As a further complication, the jurisdiction of some courts is spread across several counties or municipalities, which must share funding responsibilities. *Despite the complications of the trial court environment, the case law, taken as a whole, has come to strongly affirm that the fundamental and ultimate responsibility for all aspects of court administration, including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch.* (Emphasis added).

In *Shell v Baker Furniture*, 461 Mich 502, 512-513 (2000), a unanimous Supreme Court held that district court chief judges have broad administrative powers which extend beyond those enumerated in the court rules. This Court's administrative voice, the SCAO, recommends that chief judges consider adoption of an indemnification policy or acquisition of liability insurance for employment related claims. (Appx. p. 457a, Exhibit Y, SCAO Risk-Management

Publication.) Chief judges, therefore, have the authority to adopt and implement indemnification policies for claims and judgments related to administrative employment decisions.

The Court of Appeals ruled that chief judges lack the authority to adopt indemnification policies on behalf of the court to indemnify court personnel for personal capacity judgments which result from administrative employment decisions. This ruling conflicts with MCR 8.110(C), binding Michigan Supreme Court authority and recommendations from the SCAO. (Appx, p. 457a, Exhibit Y, SCAO Operations-Risk Management.) Pursuant to MCR 7.305(B)(1), (2), (3), (5)(a), (b), this Court should grant Pucci's Application.

D. THE COURT OF APPEALS OPINION CONFLICTS WITH AN EARLIER MICHIGAN COURT OF APPEALS OPINION.

In *O'Neill v 19th District Court*, (COA No. 223700, Unpublished, 1/25/2002) (Appx. p. 108a, Exhibit M), another Court of Appeals Panel found that MCL § 600.8221 and MCR 8.110(C)(3)(f), (i) allowed the 19th District Court to disburse \$48,708.12 to indemnify a judge for a portion of his legal fees incurred for alleged misconduct while the judge was a practicing attorney. *Id.* at 3, citing *Shell, supra* and *Judicial Ass'n v. Michigan*, 459 Mich at 299.

If a chief judge's authority extends to the district court's indemnification and payment of legal fees related to a judge's misconduct as a private attorney, such authority, *a fortiori*, must extend to assumption of a judge's personal liability for an improper employment decision made in the course of employment as chief judge. *O'Neill* is incompatible with the Court of Appeals ruling. This Court should grant Pucci's Application pursuant to MCR 7.305(5)(b).

E. THE COURT OF APPEALS SUGGESTION THAT A LOCAL FUNDING UNIT MAY VETO A COURT'S DECISION TO ADOPT AN INDEMNIFICATION POLICY TO ASSUME RESPONSIBILITY FOR A JUDGMENT AGAINST A COURT EMPLOYEE FOR ADMINISTRATIVE EMPLOYMENT DECISIONS VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The Court of Appeals suggested that local funding units may veto or override a court's

decision to adopt an indemnification policy for claims and judgments against court personnel for administrative employment actions. This notion violates the separation of powers doctrine. See e.g., *Lapeer County Clerk v Lapeer Circuit Court (in re Lapeer County Clerk)*, 469 Mich 146 154 (2003).

The Michigan Constitution's separation of powers doctrine states: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Const 1963, art 3, § 2*.

In *Judicial Attorney's Association v State of Michigan*, 459 Mich. 291, 302-303 (1998), the Michigan Supreme Court explained the administrative powers of chief judges and the importance of the judiciary's autonomy:

The judicial branch is constitutionally accountable for the operation of the courts and for those who provide court services, and must therefore be the employer of court employees. It is, of course, well established, both as a practical and a constitutional matter, that in the exercise of its employment responsibilities the judiciary must take into account the limited dollars appropriated to it by the legislative branch in the exercise of the Legislature's own constitutional responsibility. See, for example, *Bay Co*, 385 Mich. at 726-727, and *Ottawa Co*, *supra* at 603. ***The practical necessity for the judiciary to reach accommodation with those who fund the courts on an annual basis, however, cannot, as a constitutional matter, be used as an excuse to diminish the judiciary's essential authority over its own personnel. (Bold added).***

In *Lapeer County Clerk v Lapeer Circuit Court (in re Lapeer County Clerk)*, 469 Mich at 154, citing *Const 1963, art 6, §5*, this Court reaffirmed the judiciary's constitutional power over all matters of court administration, practice and procedure. This Court recognized that MCR 8.110(C)(3) "clearly provides the chief judge of the court has the power to direct matters relating to the administration of the court" including the authority to adopt policies related to personnel decisions. *Id.* at 165-166.

This Court jealously guards the judiciary's constitutional autonomy from encroachment by the other two branches of government, especially when it involves the management of court personnel. 459 Mich at 301. *Judicial Attorney's Ass'n and Lapeer County Clerk*, hold that a local funding unit may not veto or override a chief judge's decision to adopt an indemnification policy for claims or judgments against court personnel for administrative employment decisions. The *Pucci* Panel's ruling compromises the independence of the judicial branch, invites an invasion of its constitutional powers and violates the separation of powers doctrine Pursuant to MCR 7.305(B)(2), (3), and (5)(b), this Court should grant Pucci's Application.

F. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO ADDRESS WHETHER PUCCI MAY ENFORCE THE INDEMNIFICATION POLICY FOR THE JUDGMENT AS A THIRD PARTY BENEFICIARY.

Former Chief Judge Wygonik stated:

As the Chief Judge of the 19th District Court, I have adopted the earlier indemnity policy and decided that the 19th District Court will indemnify Judge Mark Somers for the judgment or any settlement in the above captioned case, *Pucci v. Somers*.

(Appx. 28a, Exhibit E, Wygonik Affidavit at ¶ 4.)

MCL 600.1405 provides in relevant part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

The promise becomes "legally binding" at the time it is made. MCL § 600.1405(2)(a).

As the intended third-party beneficiary, Pucci may enforce the 19th District Court's indemnification policy for the judgment. The Court of Appeals committed clear legal error resulting in material injustice when it refused to enforce the 19th District Court's promise to pay

the judgment on Somers's behalf. This Court should grant Pucci's Application pursuant to MCR 7.305(B)(5)(a).

G. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT MISREAD *CAMERON* TO INVALIDATE THE 19TH DISTRICT COURT'S INDEMNIFICATION POLICY FOR THE *PUCCI* JUDGMENT.

The Court of Appeals misread *Cameron v Monroe County Probate Court*, 457 Mich 423 (1998) to invalidate the 19th District Court's indemnification policy for the *Pucci* judgment because it was against Somers in his "personal capacity" only. *Pucci, supra* at *18. In *Cameron*, pursuant to a mediation agreement, a judgment was entered against a probate court for the violation of an employee's civil rights. The funding unit argued that it was not responsible for paying the judgment. 457 Mich at 425.

The *Cameron* Court disagreed and held:

The county contends, correctly, that employment discrimination is not an "expense of justice." However, supervision and administration of court personnel is a necessary expense of justice for which the county is expected to pay. The mediation judgment entered against the county is the result of poor or inappropriate administration. Just as the county would benefit from the wise and efficient administration of the judges its voters elect, so to it suffers from the thoughtless and improper administration in the instant case.

Id. at 427-428. The *Cameron* Court concluded "that counties are responsible for paying judgments entered against courts in such tort actions... If the probate court had been found liable to plaintiff, the county would be liable for any resulting judgment as a matter of law." *Id* at 428-429.

Cameron had nothing to do with an indemnification policy adopted by a governmental agency for a judgment entered against a governmental agent or employee in his individual, personal or official capacity for a work related tort. It dealt only with the funding units of obligations. What *Cameron* makes clear is that the *Pucci* judgment resulted from Somers's "supervision and administration of court personnel [which] is a necessary expense of justice...."

This is exactly the situation contemplated for indemnification by the unambiguous text of MCL 691.1408(1).

The Court of Appeals, therefore, misconstrued *Cameron* when it invalidated the subject indemnification policy because Somers incurred personal liability when he improperly terminated Pucci. Pursuant to MCR 7.305(B)(2),(3)(5)(a),(b), this Court should grant Pucci's Application.

H. THE COURT OF APPEALS RULING IS AGAINST PUBLIC POLICY BECAUSE PUBLIC EMPLOYEES TASKED WITH ADMINISTRATIVE RESPONSIBILITIES WILL NOT MAKE DISCRETIONARY DECISIONS THEY BELIEVE TO BE IN THE BEST INTERESTS OF THEIR PUBLIC EMPLOYER FOR FEAR OF PERSONAL LIABILITY AND EXECUTION ON THEIR PERSONAL ASSETS SHOULD THEIR DECISIONS RESULT IN A CLAIM OR JUDGMENT AGAINST THEM.

Chief judges and court administrators tasked with the responsibility for hiring and firing court personnel face personal exposure for their decisions, as illustrated by the case *sub judice*. Indemnification policies, like the one adopted by the 19th District Court for the *Pucci* judgment, protect chief judges and judicial staff from seizure of their personal assets related to a claim or judgment against them in their personal capacity for work related decisions. The Court's invalidation of indemnification policies for elected officials and other public employees who incur personal liability in the discharge of their discretionary functions will chill decision making and cause competent candidates to reject administrative appointment concomitant with such personal exposure. Pursuant to MCR 7.305(B)(2), this Court should grant Pucci's Application.

I. THE COURT OF APPEALS RULING DIMINISHES PUBLIC CONFIDENCE IN THE JUDICIARY BECAUSE THE DECISION WAS ANIMATED BY SUBJECTIVE "BELIEF" AND NOT THE LAW.

The Court of Appeals rejected unqualified statutory support for the validity of the indemnification policy lawfully adopted by the 19th District Court for the *Pucci* judgment. Lacking any legal reason to void the indemnification policy, the Court relied on their subjective

“belief” for the desired outcome rather than the law which required a different result. *Pucci*, at *18. Courts “hold,” “rule,” “find” or “decide” a particular issue based on the law whether or not they personally agree with the outcome. This principle is the bedrock of American jurisprudence.

The Court of Appeals engaged in judicial activism when it disregarded MCL 691.1408(1), MCR 8.110(C), and binding state and federal case law to invalidate the 19th District Court’s indemnification policy for the *Pucci* judgment. Such a result-oriented ruling diminishes the public’s confidence in the judiciary and frustrates those who rely on the rule of law for justice. This Court should grant Pucci’s Application pursuant to MCR 7.305(B)(1), (2), and (3).

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals committed clear, reversible error when it ignored the plain language of MCL 691.1408 (1), the Michigan Court Rules, and binding Michigan and federal precedent when it found that the 19th District Court lacked authority to adopt an indemnification policy for the judgment entered against Somers in his personal capacity for his official acts.

ACCORDINGLY, for the reasons contained herein, Plaintiff-Appellant Julie Pucci asks this Court to grant her Application for Leave to Appeal, peremptorily reverse the opinion of the Court of Appeals and award other relief this Court deems appropriate.

Respectfully submitted,

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Dated: June 7, 2016